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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/707,156	11/06/2000	Vivian A. Schramm		8663

7590 06/09/2005

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EXAMINER	
WEINSTEIN, STEVEN L	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 06/09/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/707,156	SCHRAMM ET AL.	
	Examiner	Art Unit	
	Steven L. Weinstein	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *14 February 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-14 and 21-25* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-14 and 21-25* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

Claim 4 is rejected under 35 U.S.C. 112, second paragraph for being indefinite. The phrase "said lollipop" in claim 4, lacks antecedent basis since the phrase does not appear in either claim from which claim 4 depends (i.e. claim 3 or claim 1)

Claims 1-14 are rejected under 35 U.S.C. 112 first paragraph for containing New Matter. As disclosed, applicant's sole disclosure of the candy material in the container is either the lollipop or a solid particulate material. The phrase edible "flowable" candy substance is readable on liquids, which are not disclosed as originally filled.

Claims 1-14 and 21-25 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-9 of U.S. Patent No. 5,246,046 and claims 1-11 of Re. 36,131 in view of Hunter (GB '356), Martindale ('797), Coleman ('884), and Hoeting et al ('870) for the reasons fully and clearly detailed in the Office action mailed November 17, 2004.

Claims 1-14 and 21-25 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-29 of U.S. Patent No. 6,386,138 in view of Hunter (GB '356), Martindale ('797), Coleman ('884), and Hoeting et al ('870) for the reasons fully and clearly detailed in the Office action mailed November 17, 2004.

Claims 1-14 and 21-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hunter (GB '356) in view of Schramm ('046) and Martindale ('797), further in view of Coleman ('884) and Hoeting et al ('870), or vice versa, i.e. Coleman and Hoeting et al in view of Hunter, Schramm and Martindale, both further in view of applicants'

admission of the prior art, Kennedy ('390), Beutlich et al (GB '581), McCombs ('714), Meth ('599) and Patterson ('975) for the reasons fully and clearly detailed in the Office action mailed November 17, 2004 .

Claims 1-14 and 21-25 are rejected under 35 U.S.C. 102(e)103 in view of Hunter (GB '356), Schramm ('138) and Martindale ('797), further in view of Coleman ('884) and Hoeting et al ('870), or vice versa, both further in view of applicant's admission of the prior art, Kennedy ('390), Beutlich et al (GB '581), McCombs ('714), Meth ('599) and Patterson ('975) for the reasons given in the Office action mailed November 17, 2004 .

All of applicant's remarks filed February 14, 2005 have been fully and carefully considered but are not found to be convincing. The obvious type double patenting rejections are traversed on the grounds that the invention claimed in the current application is "substantially different" from that claimed in applicants patents. This urging is not convincing for the reasons detailed in the last Office action. The differences are substantially in the content of the container. Once it was known to provide a funnel containing container to prevent spillage of the contents, even when opened, the particular spillable contents one chooses to place in the container is seen to have been obvious. There is no unexpected result. It would be unexpected if the edible product was able to spill out of a funnel containing container. Also, the issue is not whether a lollipop could be coated, since the art taken as a whole teaches coating a lollipop by dipping it into a container containing particulate candy. It is not necessary for Hoeting or Coleman to teach spill preventing means for an opened container since that is

already recited (and disclosed) in applicant's patents. In an obvious double patenting rejection, the claims of the application are compared to the claims of the patent and obviousness is determined with or without secondary art.

Applicants also urge that Coleman and Hoeting are negative teachings. They are not. In the obvious double patenting rejections, Coleman and Hoeting are only relied on to teach that it was known to put particulate candy in a container, that it was known to associate a lollipop with the particulate candy and that it was known that flowable materials can obviously flow (or spill) out of a container. In the obvious type double patenting rejections, the references are applied as evidence that it would have been obvious to employ the particulate material in a funnel containing, spill-resistant container. Coleman and Hoeting do not have to teach spill resistant opened containers since that is taught by applicant's patents. Note, too, it is urged that Coleman stores the lollipop product outside of the particulate containing compartment of the container, but this urging is directed to limitations not found in the claims. The relationship between container, funnel, lollipop and particulate is not recited in the claims. It is finally noted in this regard, that patentability is not predicated on what one reference did or did not realize but rather patentability is predicated on what the art taken as a whole taught at the time of applicant's invention (i.e. the effective filing date of applicants' application).

On page 8 of the response, applicants further urge commercial success. Commercial success urgings are considered as secondary evidence and must be carefully reviewed for a connection between the invention and the commercial

success purported to derive from the invention. Commercial success urgings are made in Declaration form under 37CFR 1.132 and must provide factual evidence. Even if commercial success can be proven, it may still not outweigh a weighty case of prima facie obviousness. Contrary to what is urged on page 8 of the response, the present application is not a continuation of '046 and RE. 36,131 but instead is a continuation-in-part of these patents, which is, of course, a significant difference. The most important difference is that applicants did not have in their possession at the time of filing the patented, parent applications, the invention of using the spill resistant container with candy material. It is irrelevant what the examiner did or did not do in the parent applications. The current application must be viewed in the light of the teachings of all of the art (the art taken as a whole) at the time of filing applicant's current invention. The fact that the bubble solution container containing a funnel for spill resistance may or may not have been commercially successful does not play a roll in determining patentability of claims in a new application claiming a funnel containing container with an edible particulate candy when the bubble solution containing container is prior art against the claims in the new application.

All of the remaining urgings found on pages 9-15 have been fully and carefully reviewed but are found to be restatements of urgings made in previous pages of the amendment. As such, they are not convincing for the reasons given above.

Finally, note that the art is replete with funnel containing containers wherein a tool or applicator element is passable through the funnel to contact and be associated with contents in the container.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication from the examiner should be directed to Steven L. Weinstein whose telephone number is (571) 272-1410. The examiner can generally be reached on Monday-Friday from 6:30 a.m. to 3:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

S.L. Weinstein/dh
June 6, 2005

Steven Weinstein
STEVE WEINSTEIN
PRIMARY EXAMINER